Filed 7/13/10 Marriage of Torres CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of MARCO and VICKY TORRES.	B214980 (Los Angeles County Super. Ct. No. VD 058128)
MARCO TORRES, Appellant, v. VICKY TORRES, Respondent.	

APPEAL from orders of the Superior Court of Los Angeles County, William A. Allen, Commissioner. Affirmed.

Law Offices of Vincent W. Davis & Associates, Vincent W. Davis and Mark L. Tseselsky for Appellant.

Law Offices of Marjorie G. Fuller and Marjorie G. Fuller for Respondent.

* * * * * *

Marco Torres appeals from orders made by the trial court at a January 27, 2009 hearing of a postdissolution of marriage order to show cause in which appellant requested that the trial court modify custody or visitation for his and respondent Vicky Torres's children. Appellant contends the trial court ordered him to pay certain debts not affirmatively raised as an issue in the order to show cause and the trial court exceeded its statutory authority in ordering him to do so. He also appeals the court's award of attorney fees to respondent. We affirm.

FACTS AND PROCEDURAL HISTORY

Appellant petitioned for dissolution of his marriage to respondent in April 2005, and a judgment of dissolution was entered in February 2006.

The parties have two minor children, a son (age 7) and a daughter (age 5). The parties battled over custody and visitation of the children, with the matter being referred to the juvenile dependency court and then back to the family law court in June 2008, after an exit order for joint legal custody with primary physical custody to respondent and reasonable specified visitation to appellant.

In November 2008, appellant filed an order to show cause for modification of child custody, visitation, child support, attorney fees and costs and for "[r]eimbursement of arrears." Appellant requested custody of the children be changed to him and that the court award child support according to guideline. He also asked that respondent be ordered to pay his attorney fees.

In a supplemental declaration, appellant added a request for an Evidence Code section 730 evaluation "to [e]valuate [respondent's] [p]arental [a]lienation" of the children against appellant. In September 2006 and January 2008, the court had ordered appellant to pay arrears by way of a $250 per month wage assignment until the remaining balance was paid off. Appellant claimed that by the end of 2008 he would have overpaid $1,405, and he requested that any overpayment be returned to him or that he be credited with the overpayment.

Respondent opposed the order to show cause and requested that the current child custody and support order and wage assignment remain in effect. Under the heading

"[o]ther [r]elief" requested, respondent asked the court to order appellant to pay a "long outstanding debt" owed to her.

In her responsive declaration, respondent denied any parental alienation. She noted that the dependency petition had not alleged such a claim and none of the many experts appointed by the court, nor the children's attorney or their therapists, had ever mentioned a suspicion of parental alienation. Respondent asked that the court continue the wage assignment of $250 until all of appellant's arrears were paid in full. She also asked the court to award her attorney fees for what she called a "bad faith, ill-conceived and without basis Order to Show Cause" filed by appellant.

The trial court construed appellant's order to show cause to be a motion for change in custody due to alienation. The court denied appellant's request for an Evidence Code section 730 evaluation, finding no facts to support appellant's motion. The court found appellant's motion for change of custody for parental alienation to be "far-fetched." The court further determined that appellant owed respondent $5,500 in attorney fees and $4,500 in credit card fees, with a credit of $1,000.

At the hearing, the court elicited from respondent's counsel an estimate that respondent had incurred $6,000 in attorney fees to defend the parental alienation charge. The court indicated it would grant respondent's counsel leave to submit an amended declaration to support the fee request notwithstanding appellant's objection. The court entered an alternative order, directing appellant either to pay the sum of $6,000 "if [appellant] insists that an attorney fee declaration be filed and submitted," or, alternatively, appellant could pay the sum of $3,250 on or before April 1, 2009.

The court subsequently entered a written order incorporating its findings and rulings, and this timely appeal ensued.

CONTENTIONS

Appellant contends the trial court erred in addressing matters not raised in the order to show cause and exceeded its authority in directing appellant to perform acts not raised as issues in the order to show cause. Appellant asks this court to reverse the trial court's orders: (1) directing that $250 being collected under wage assignment "for child

support arrears" be applied to satisfy the two prior attorney fee awards; (2) directing that the overpayment for child support arrears be applied to satisfy credit card debt from the division of property; and (3) directing appellant to pay respondent $3,250 in attorney fees.

STANDARD OF REVIEW

We independently review any questions of law necessary to the resolution of this matter on appeal. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) Questions of fact that concern the establishment of historical or physical facts are reviewed under the substantial evidence test, as are mixed questions of law and fact requiring "application of experience with human affairs." (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888; *Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1421.) As to the trial court's factual findings, we do not reweigh the evidence or reconsider credibility determinations but consider the evidence in the light most favorable to the trial court, indulging in every reasonable inference in favor of the trial court's findings and resolving all conflicts in its favor. (*In re Marriage of Rossi* (2001) 90 Cal.App.4th 34, 40; see *In re Marriage of Bonds* (2000) 24 Cal.4th 1, 35.)

A reviewing court should not disturb the trial court's exercise of discretion unless it appears that there has been a miscarriage of justice. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566; *In re Marriage of Dandona & Araluce* (2001) 91 Cal.App.4th 1120, 1126.) We review an award of sanctions under Family Code section 271 for abuse of discretion. (*In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1478.) An attorney fee award as sanctions will be overturned only if, considering all of the evidence viewed most favorably in support of the order, no judge reasonably could make the order. (*Ibid.*)

DISCUSSION

1. Affirmative Relief

Appellant contends the trial court erred by ordering the continuing payment of $250 a month from him to respondent by wage assignment for arrears in his court ordered payment of attorney fees, asserting that "credit for overpayment of arrears in child

support" is not the same as ordering a party to pay for outstanding debts. We find no support for appellant's contention in the record.

A party served with an order to show cause re modification may use a responsive declaration to seek affirmative relief on the same issues raised by the moving party. (Fam. Code, § 213;[1] see Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2009) ¶ 17:394, p. 17-96 (rev. # 1, 2009); *In re Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116, 1127.) However, a party may not use a responsive declaration to obtain affirmative relief on issues not raised by the moving party, and he or she must serve and file an independent order to show cause or notice of motion. (*Seagondollar*, at p. 1127.)

In *Brody v. Kroll* (1996) 45 Cal.App.4th 1732 (*Brody*), the parents had joint legal custody with physical custody to the mother. The mother filed an order to show cause, seeking permission to move out of state with the child. The child's father opposed the move, and he marked the box indicating custody was at issue in his responsive papers. (*Id.* at p. 1735.) The court held the pending move clearly constituted a change in circumstances sufficient to allow the court to consider a change in custody, and the change in circumstances, coupled with the father's response, properly placed the issue of custody before the court. (*Id.* at p. 1736.) We find *Brody* helpful to the present circumstances.

In the present case, appellant raised the issue of "[r]eimbursement of arrears" in his order to show cause. In his application, he marked the box asking for "[o]ther [r]elief" and specified "[r]eimbursement of overpaid arrears." He did not purport to limit "arrears" solely to child support. Appellant's supplemental declaration referred to "[c]hild [s]upport [a]rrears" in its title, but simply referred to the fact that the court had ordered him to pay for "arrears" in its September 2006 and January 2008 orders, and he

---

[1] Family Code section 213, subdivision (a) provides: "In a hearing on an order to show cause, . . . the responding party may seek affirmative relief alternative to that requested by the moving party, on the same issues raised by the moving party, by filing a responsive declaration . . . ."

claimed by the end of 2008 he estimated he will have overpaid arrears by $1,405. He requested the overpayment be either returned or credited to him.

In her response to the order to show cause, respondent also marked the box entitled "[o]ther [r]elief." Respondent stated she did not consent to the order appellant requested and indicated her consent to appellant "paying long outstanding debt owed to respondent." In her declaration in support of the order to show cause, respondent admitted that appellant had paid an additional $250 for the last five months and the overpayment amounted to $1,930, the difference in child care expenses because of their daughter's admission to kindergarten. However, respondent asked that the court order appellant to continue making the additional $250 payments because appellant still owed her $5,500 from the two prior attorney fee orders and an additional sum for a credit card bill appellant was ordered to pay in the judgment.[2]

The issue of the amount of appellant's arrearage was properly placed before the court by appellant's seeking "[o]ther [r]elief" in the form of reimbursement of "arrears," together with respondent's corresponding request for payment of outstanding debt owed by appellant pursuant to court order. (See *Brody, supra*, 45 Cal.App.4th at p. 1736; see also *In re Marriage of O'Connell* (1992) 8 Cal.App.4th 565, 574-576 [ex-spouse's motion to reduce spousal and child support placed his life insurance at issue, as "[w]hen a support obligor pleads inability to maintain an existing level of spousal and child support from current income, it is reasonable to expect that the court will consider available support alternatives including modification of life insurance"]; *Anderson v. Anderson* (1954) 129 Cal.App.2d 403, 407 [motion to increase support placed modification in general in issue and authorized court to *increase or decrease* payments].)

The court properly determined arrearages based on the amount owing and ordered appellant to pay the additional monthly payment "to reduce the overall attorney's fee award . . . ." Family Code section 290 grants the court "broad discretion to select appropriate enforcement remedies and terms; and, in exercising that discretion, to take

---

2 The credit card payment was covered by outstanding writs.

the equities of the situation into account." (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 18:1.5, p. 18-1; Fam.Code, § 290 ["A judgment or order made or entered pursuant to this code may be enforced by the court by execution . . . or by any other order as the court in its discretion determines from time to time to be necessary"].)

An order crediting overpayments to arrearages and directing monthly payments on arrearages is such an order within the court's discretion. (See *In re Marriage of Tavares* (2007) 151 Cal.App.4th 620, 626 ["where a parent has made payments beyond those ordered, the court may credit the surplus to arrears"]; *Keith G. v. Suzanne H.* (1998) 62 Cal.App.4th 853, 858-860 [trial court has discretion to determine manner in which judgment will be enforced and may set off overpayments against whole or part of judgment]; *In re Marriage of Peet* (1978) 84 Cal.App.3d 974, 980-981 [court has discretion to apply prior overpayment of child support to child support arrearages].)

Appellant's contention therefore has no merit.

At oral argument, appellant's counsel contended that appellant failed to receive adequate notice under Family Code section 213's requirement that the responsive declaration be filed "within the time set by statute or rules of court." Respondent's opposition to the order to show cause, including her responsive declaration seeking affirmative relief, admittedly was not timely filed. At the hearing, appellant's counsel objected to the court's consideration of the late response, saying, "I would ask the court not to consider it and to grant [appellant's] request [in the order to show cause]."

The court inquired of respondent's counsel if she thought that would be fair. Respondent's counsel, not surprisingly, stated it was not and added that she had received the order to show cause by mail just before Christmas and a response "took some time" to prepare. The trial court expressed a willingness to continue the matter, saying, "[w]e can do it today or put it over for a few days." Appellant's counsel responded that he had filed a reply to the response earlier that day and "I would ask the court if it is going to consider their opposition, to consider our reply as well." The court asked appellant's counsel, "what do you want to do?" Counsel responded, "I would like the court to indicate if the court has a tentative ruling . . . ."

After some colloquy between the court and both counsel concerning the complex history of the case and the requested relief, the court told counsel, "I just got these declarations today, so I'm going to have to read these. [¶] Do you want to come back this afternoon or tomorrow or the next day?" Respondent's counsel expressed a preference for returning "[t]omorrow or the next day," but appellant's counsel stated, "I would rather come back this afternoon." The court directed the parties to return in the afternoon, indicating it would read all the documents in the interim. The court held a hearing on the order to show cause later that day and made the orders in issue.

From this record, it is clear that appellant, through his counsel, acquiesced in the proceedings and waived any objection to the trial court's consideration of the untimely opposition, including respondent's request for affirmative relief. (*Kunzler v. Karde* (1980) 109 Cal.App.3d 683, 688; *McGarvey v. Southern Pacific Milling Co.* (1935) 5 Cal.App.2d 604, 607.)

2. Continuation of Wage Assignment

Appellant misconstrues the family court's orders in contending it ordered him to pay $250 a month in child support to cover previously ordered attorney fees. The court ordered that the $250 a month being collected by wage assignment from appellant's pay to be continued and used to reduce attorney fees previously awarded to respondent, which appellant had failed to pay. The order states that "[t]he $250.00 per month currently being collected by Wage Assignment from the [appellant's] pay shall continue and shall be utilized to reduce the previous attorney fee awards that [appellant] was to pay to the [r]espondent." As we have observed, the court has broad discretion to select appropriate remedies and terms to enforce its judgments, and this order falls well within the court's authority and discretion. (Fam. Code, § 213.)

Boutte v. Nears (1996) 50 Cal.App.4th 162, on which appellant relies, is inapposite. In *Boutte*, the court's order purported to award attorney fees as "'supplemental child support.'" (*Id.* at p. 164.) The appellate court held the trial court had no authority under the Family Law Act to order attorney fees paid to a third party as supplemental or additional child support. (*Boutte*, at p. 165.) "Converting a common

attorney fee award into 'additional child support,'" the court stated, "has no foundation in the Family Code and in fact contravenes it, both in letter and spirit." (*Id.* at p. 166.) The court did not award attorney fees as "supplemental child support" in this case.

Appellant also erroneously claims the court below ignored federal bankruptcy law by ordering appellant to pay attorney fees through the existing wage assignment because it prevented appellant from discharging such fees in bankruptcy. This argument is frivolous. First, there is no indication in the record that appellant has declared or is in danger of declaring bankruptcy. Second, the case appellant cites as authority, *In re Marriage of Williams* (1984) 157 Cal.App.3d 1215, 1221, a case holding that the court erred in allowing a spouse to offset a discharged indebtedness owed him by his ex-spouse to equalize a division of community property because it would frustrate the intent and purpose of the federal Bankruptcy Act, has been superseded by statute. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), 11 U.S.C. § 523, subdivision (a) presently provides that a debtor is *not* discharged from any debt: "(5) for a domestic support obligation; . . . [or] (15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record . . . ." Third, as a noted treatise has observed, "[a]s a practical matter, the BAPCPA has made it far less important to litigate whether a family law attorney fee award can be characterized as 'in the nature of' support for § 523(a)(5) dischargeability purposes. Most debts between spouses arising out of attorney fee awards in a dissolution proceeding probably are now dischargeable under 11 USC § 523(a)(15)." (Hogoboom & King, Cal. Practice Guide: Family Law, *supra*, ¶ 18:73.3, p. 18-27 (rev. # 1, 2006).)

The trial court thus did not exceed its statutory authority in ordering the wage assignment to continue to satisfy awarded attorney fees.

3. Awarded Attorney Fees

Appellant asserts that because the trial court and the responsive papers did not spell out the statutory grounds for attorney fees, i.e., need-based fees (Fam. Code, §

2030) or sanctions (Fam. Code, § 271), this court may select the "more reasonable interpretation." (*In re Marriage of Lucio* (2008) 161 Cal.App.4th 1068, 1082 (*Lucio*).)

Viewing the record, we conclude the "more reasonable" interpretation is that the trial court awarded respondent attorney fees and costs based on sanctions against appellant. In her responsive papers, respondent asked that the court deny appellant's request for attorney fees and instead award her attorney fees "for this bad faith, ill-conceived and without basis Order to Show Cause." The trial court found there were no facts to support appellant's claim and expressly found appellant's request for change of custody on the grounds of parental alienation to be "far-fetched." At the hearing, the court stated such a claim was "a very serious charge when there really isn't any evidence of it." The court observed respondent had to hire an attorney, and the attorney had to deal with the far-fetched parental alienation complaints, requiring respondent to incur a "significant amount" of attorney fees.

The court never indicated it was awarding "need based" attorney fees. Both parties had provided the court with updated income and expense declarations, and these declarations showed respondent made slightly more in gross monthly earnings than appellant.[3]

A court may award attorney fees and costs as sanctions under subdivision (a) of Family Code section 271 based upon "the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys." The party requesting an award of attorney fees under section 271 is not required to demonstrate financial need for the award. (Fam. Code, § 271, subd. (a).) "'[S]ection 271 sanctions have been upheld for "obstreperous conduct which frustrated the policy of the law in favor of settlement, and caused the costs of the litigation to greatly increase . . . ."'" (*Lucio, supra,* 161 Cal.App.4th at p. 1082.) The

---

[3] The declarations showed that appellant had gross earnings of $6,640, plus about $1,000 in commission, a month and respondent had gross earnings of $8,026 a month.

trial court's reference to appellant's conduct indicates an award of attorney fees based on sanctions rather than respondent's financial need.

Appellant suggests that the sanction order here must be reversed because it fails to show "frustration" by the party. We find ample support in the record for the court's finding that appellant's conduct in bringing baseless charges against respondent, causing her to incur substantial fees to defend them, merited imposition of sanctions. The responsive papers related the long history of the litigation, including a reference to the dependency court, noted the approximately one dozen experts who were involved with the family, and pointed out that never once was there any allegation by appellant or anyone else of parental alienation. The record, on the other hand, was replete with appellant's obstructive behavior with respect to visitation and custody issues, conduct leading to the frustration of the statutory policy of promoting settlement and the reduction of costs.

Appellant asserts the trial court gave merely an "illusion" of due process by giving him a choice between paying $3,250 in attorney fees by April 1, 2009, i.e., within approximately two months, or to "pay more" at a separate later hearing. In the trial court, appellant's counsel objected to an award of attorney fees on the basis that it would violate a local rule requiring evidentiary support for a request for attorney fees. The court indicated if appellant required such proof, he should notify respondent within 15 days, and the court would grant counsel for respondent leave to file a declaration substantiating her fees. Family Code section 271, subdivision (b) provides that sanctions "shall be imposed only after notice to the party against whom the sanction is proposed to be imposed and opportunity for that party to be heard." (See also *In re Marriage of Feldman, supra,* 153 Cal.App.4th 1470, 1495.)

We find no violation of appellant's right of due process. Due process simply requires reasonable notice and an opportunity to be heard. (*In re Marriage of Petropoulos* (2001) 91 Cal.App.4th 161, 178.) In her responsive papers, respondent requested attorney fees for appellant's "bad faith, ill-conceived and without basis" filing of the order to show cause. Appellant therefore was aware of respondent's request for

sanctions. Through his attorney, he requested that the court "consider my reply" if the court decided to consider respondent's belated response. At the hearing of the order to show cause, respondent's counsel orally estimated her fees to be $6,000. Appellant's own counsel had submitted a fee request for over $7,300, roughly in the same ballpark. Appellant's counsel declared he expended at least 16 hours to prepare the order to show cause because "it was necessary to go back and review the entire case which stretched for years." Presumably, respondent's counsel was required to go over the same extensive history to oppose the order to show cause. The court gave appellant the opportunity to pay attorney fees of less than half of the fees sought by his own counsel, and a little more than one half of that claimed by respondent, failing which appellant had the opportunity to contest the award of any attorney fees on a full evidentiary showing. The record does not show appellant took advantage of that opportunity. Appellant thus had notice and a reasonable opportunity to be heard on the attorney fee issue. (*Id.* at pp. 178-179.)

DISPOSITION

The orders are affirmed. Respondent is to recover costs on appeal.

FLIER, J.

We concur:

RUBIN, Acting P. J.

GRIMES, J.